

a

LIM KIM HAI ELECTRIC (M) SDN. BHD.

v.

MOKHTARUDDIN MOHAMED

HIGH COURT MALAYA, KUALA LUMPUR

EUSOFF CHIN J

b

[CIVIL APPEAL NO. 83 OF 1984]

18 MARCH 1985

LABOUR LAW: *Employment - Respondent worked for appellant as guard - Whether employment contract of service or contract for services.*

c

This is an appeal against the decision of the Assistant Commissioner for Labour at Port Kelang. The respondent claimed that he was entitled to overtime payments and payments for work during public holidays and annual leave on the basis that he was an employee of the appellant, who on the other hand, said that the respondent was an independent contractor. The main issue was whether the relationship between the two was based on a contract of service, or a contract for services.

d

The respondent went with his friend to look for employment as guards at the appellant's business premises. The appellant was willing to pay them RM250 per month each. Upon the respondent's friend refusing the appointment, the respondent was offered RM500 per month which offer the respondent accepted. In addition to monthly payment, the respondent also received ang pows for Hari Raya Puasa and Chinese New Year. The working hours were fixed. After the appellant moved into new premises, the respondent was required to clock in at every two hours, beginning at 10 p.m. When on leave, the respondent arranged for an employee of the appellant to replace him.

*e***Held:**

[1] For a contract of service to exist, the following four factors should be present:

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- (a) the master's power of selection of his servant;
- (b) the payment of wages or other remuneration;
- (c) the master's right to control the method of doing the work; and
- (d) the master's right of suspension or dismissal.

g

[2] From the facts, there was no doubt that the appellant selected the respondent for employment as a guard. Although it was difficult to conclude positively as to whether the monthly remuneration was wages or security fees, nevertheless, it was clear that based on the facts, the appellant had the right to determine what work the respondent had to do, and also how the respondent was to carry out that work. The respondent had engaged to perform the guard duties not as a person in business of his own. Thus, he was employed on a contract of service. As for the master's right of suspension or dismissal, the appellant had the right to dismiss the respondent for misconduct during duty hours and also the right to terminate the respondent's services which in fact is dismissal, for industrial misconduct.

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[Appeal dismissed with costs.]

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Cases referred to:

Bata Shoe Company (Malaya) Ltd. v. Employees Provident Fund Board [1965-67] MLR 227

Employees Provident Fund Board v. M.S. Ally & Co. Ltd. [1975] 2 MLJ 89

Market Investigations Ltd. v. Minister of Social Security [1968] 3 All ER 732

For the appellant - M. Mahalingam; M/s. Aziz Abdullah & Co. and M/s. Michael Chen & Lee

For the respondent - Kevin Danker; M/s. Zain & Co.

JUDGMENT

Eusoff Chin J:

This is an appeal against the decision of the Assistant Commissioner for Labour at Port Kelang.

The respondent Mokhtaruddin bin Mohamed was working for the appellant, Lim Kim Hai Electric (M) Sdn. Bhd. His claim against the appellant was for alleged-

- (a) overtime performed during normal working days;
- (b) overtime performed during rest days;
- (c) work during rest days;
- (d) work during Public Holidays; and
- (e) work during Annual Leave.

The respondent claimed that he was entitled to those amounts because he was an employee of the appellant. On the other hand, the appellant said that the respondent was an independent contractor. The main issue was whether the relationship between the two was based on a contract of service, or a contract for services.

The respondent's evidence recorded by the Commissioner for Labour at the Kelang Labour Department shows that the respondent and a friend went to look for employment as guards at the appellant's business premises in early 1978. The appellant wanted two guards, and was willing to pay each of them RM250 per month. But the respondent's friend refused to accept the appointment. The respondent then agreed, when offered by the appellant, to work for the appellant at a payment of RM500 per month. As agreed by the parties before the Labour Court, the respondent was paid RM500 per month from 1 March 1978 to 31 December 1982, and from 1 January 1983 to 30 October 1983 he was paid RM550 per month. For Hari Raya Puasa, and Chinese New Year, he was given ang pows of RM100 to RM200. The hours of work were from 5 p.m to 8.30 a.m. on Mondays to Fridays, and 1 p.m to 8.30 a.m. on Saturdays, and whole day on a public holiday. The respondent's duties were to patrol the appellant's premises during those working hours to prevent thieves entering the premises. The appellant, at respondent's request, gave the respondent an undated document (Exh. C1) (the date appearing therein having been inserted by the respondent) which states-

TO WHOM IT MAY CONCERN

We wish to inform that Mr. Mokhtaruddin Bin Mohamed,

I.C. No. 2103124 is our company guard.

a The time on duty is as follows:

Monday to Friday : from 5 p.m. to 8.30 a.m.

Saturday : from 1 p.m. to 8.30 a.m.

Sunday & Public

b Holiday : On 24 hour basis.

Sgd. CHIA SIEW WONG

Director.

The respondent said that he always followed the working hours as stated in Exh. C1.

c The appellant originally had its premises in Petaling Jaya, but in October 1980, the appellant moved into new premises at Subang Jaya where the respondent was then required by the appellant to clock in at every two hours beginning at 10 p.m.

The respondent gave evidence when he was recalled after appellant produced Exhs. D1 and D2. The respondent said he did not understand English and had signed these exhibits to acknowledge the receipts of the amounts. He understood them as his wages.

d Whenever the respondent went on leave, he had to inform one Mr. Chin an official of the appellant, and the respondent had to arrange with an employee of the appellant to replace him. He had to pay food money to the person who carried out the guard duties in the respondent's absence.

e From where the respondent was working he could see the premises of Sing Kwang Industries. The late chairman of Sing Kwang Industries had asked respondent to keep an eye on his premises. Respondent agreed and he was paid RM150 per month in 1981.

Since the appellant had refused to pay the respondent for overtime work, the respondent filed his claim at the Labour Department. He claimed that the RM550 was his monthly wages.

f A director of the appellant Mr. Chia Siew Wong gave evidence to the effect that before the appellant engaged the respondent, the appellant had contracted with Safeguards to guard its premises at RM640 per month since 1976. He confirmed that the respondent could only engage an employee of his company to replace him (respondent) whenever he was on leave. He also confirmed that the respondent was paid ang pows for Hari Raya and Chinese New Year. He also said that the company could dismiss the respondent or terminate his contract if he did not turn up for work. According to Mr. Chia, the respondent's terms of contract were as contained in Exh. C1. He agreed that the respondent was originally required by his

g company to punch the time clock once every hour, but when the respondent complained that he had no rest the company allowed him to punch the time clock every two hours.

h DW2 Sinnathamby, an employee of the appellant had confirmed that he carried out the duties of the respondent on a number of occasions when the respondent was on leave, and he was paid RM15 per day by the respondent. According to DW2 there were other occasions when he saw other people, not the appellant's employees, who had performed respondent's duties. But later he said he seldom saw these outsiders. My view is that he was not sure if respondent ever employed outsiders (non-company employees) to replace him. The Assistant Commissioner for Labour had rejected his evidence.

i The Assistant Commissioner for Labour had decided that the contract entered into by the appellant and the respondent was a contract of service, and not a contract for services.

A contract of service is one in which a person undertakes to serve another and to obey his reasonable orders within the scope and the duty of the undertaking. Whether or not a particular contract is a contract of service is a question of fact, depending upon the terms of engagement, the method of remuneration, and the power of controlling and dismissing the workman. But none of these factors is by itself conclusive - *Bata Shoe Company (Malaya) Ltd. v. Employees Provident Fund Board* [1965-67] MLLR 227.

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In *Employees Provident Fund Board v. M.S. Ally & Co. Ltd.* [1975] 2 MLJ 89 the Federal Court held that for a contract of service to exist the following four factors should be present-

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- (a) the master's power of selection of his servant;
- (b) the payment of wages or other remuneration;
- (c) the master's right to control the method of doing the work; and
- (d) the master's right of suspension or dismissal.

c

There is no doubt that the appellant selected the respondent for employment as a guard.

As regards the monthly remuneration, initially of RM500 per month and later increased to RM550 per month, the respondent said it was his monthly wages, but the appellant said it was security fees. The appellant produced two payment vouchers - documents, Exhs. D1 dated 29 December 1982, and D2 dated 27 January 1983. Earlier payment vouchers from 1 March 1978 to November 1982 were not produced to establish whether it was security fees or wages paid to respondent in 1978.

d

There was no written contract between the parties, nor any letter of employment issued to the respondent by the appellant when the appellant engaged the respondent to work for the company. The only document issued by the appellant to the respondent was the Exh. C1 in which the appellant had acknowledged that the respondent was the appellant's "company guard", and it shows the duty hours of the respondent.

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The evidence shows that the appellant had engaged Safeguards to look after the security of its premises in the years 1976, 1977 at about RM640 per month.

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After that the appellant decided to recruit two guards whose duties were to look after the security of its premises. But the monthly payment of RM250 for each guard was so low that the respondent's friend rejected the offer. The respondent was however willing to perform the duties of the guards for RM500 per month. There is no evidence to say that the appellant had explained to the respondent that the respondent would be employed as an independent contractor, and not as an employee. He was only told that he would be paid so much per month, and what his duty hours were. He had never worked as an independent contractor. He believed he was to be employed as a company guard for wages of RM500 per month. He did ask twice for Employees Provident Fund benefits, and overtime allowances but was refused. But like other employees he was paid ang paws for Chinese New Year and one month's pay for Hari Raya.

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From the evidence, my view is that the appellant wanted to engage two guards as company employees, to work in shifts, so that on normal working days each guard would not exceed the permitted eight hours and in so doing, the appellant need not have to pay each guard any overtime, and on public holidays, the overtime payable would be just a few hours for each guard. I think the appellant thought that since the respondent had agreed to do the other guard's duties and be paid RM250 extra, he should not be paid any overtime for it. I think the law does not allow this to happen.

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a From the evidence, it is indeed difficult to conclude positively as to whether the monthly remuneration was wages or security fees. It is necessary to look into the other factors to determine whether the contract of employment was one of service or for services.

b As regards the third indicia, (the control test) there is no dispute to the hours of work. They were as those specified in Exh. C1. However, on the taking of leave, the evidence shows and the Labour Court had found as a fact that the respondent could only go on leave if he could get a replacement. But the replacement must be an employee of the appellant with whom the respondent was given the freedom to make arrangement. The respondent was required by the appellant to be present for duties at certain hours, to make rounds of the premises, and to collect the keys and punch the clock every two hours. It is clear that the appellant had the right to determine what work the respondent had to do, and also how the respondent was to carry out that work. Therefore the respondent performed his work subject to the orders of the appellant. The respondent was not a professional man, or a man of some particular skill or experience. He was just a company guard to whom the appellant could give directions regarding what work to do and how to do it.

c In *Market Investigations Ltd. v. Minister of Social Security* [1968] 3 All ER 732, the Court held that where a person had engaged himself to perform the services was performing them as a person in business of his own, then the contract is one for services. Otherwise, the contract is one of service.

d In the present case, I agree with the Assistant Commissioner for Labour that the respondent had engaged himself to perform the guard duties not as a person in business of his own. He was, therefore, employed on a contract of service.

e Chia Siew Wong, a director of the appellant company had given evidence that he had the right to dismiss the respondent for misconduct during duty hours. Later he said he would terminate the respondent's services if the latter did not turn up for work or was absent during working hours. My view is that the appellant had the right to terminate the respondent's services, which in fact is dismissal, for industrial misconduct.

f Counsel for the appellant voiced the fear that the respondent may bring similar action for overtime against Sing Kwang Industries Sdn. Bhd. because respondent had kept an eye on the premises of that company in the course of performing his rounds. Though he was paid RM150 per month, the respondent was not engaged as that company's guard, but simply to keep an eye on those premises.

g I would therefore dismiss this appeal. Since there was insufficient evidence as to the actual number of days the respondent was absent (on leave?) from work, the parties should adduce further evidence on this issue so as to enable the Assistant Commissioner for Labour to make his calculation for overtime, etc. to be paid to the respondent.

I also order costs against the appellant.

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Also found at [1985] 2 CLJ 145

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